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No. 87-1579

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

FRANK DURANT JEFFERS,

PETITIONER,

vs

WILLIAM D. LEEKE AND
T. TRAVIS MEDLOCK,
ATTORNEY GENERAL OF
SOUTH CAROLINA,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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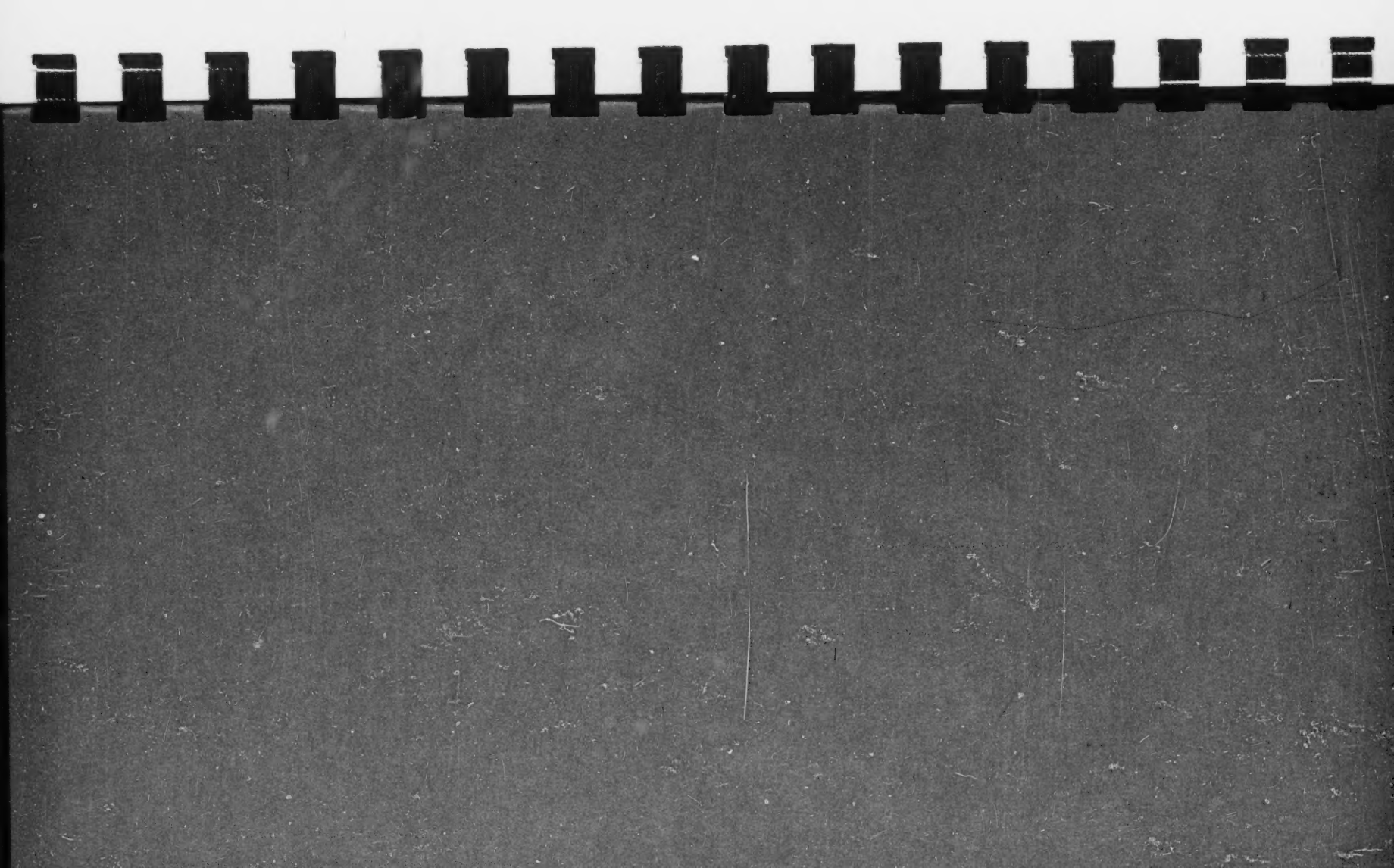
35 pp



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RESPONDENTS QUESTIONS PRESENTED

I.

Did the Court of Appeals have authority under Rule 52(a) of the Federal Rules of Civil Procedure to reject the District Court's conclusion of "prejudice" and determine there was no prejudice in an ineffective assistance of counsel claim in habeas corpus?

II.

Did the Court of Appeals properly find that a habeas corpus petitioner was not prejudiced by any alleged deficiency in counsel's performance?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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Respondents, above named, make a Brief in Opposition to the Petition for Certiorari to the United States Court of Appeals for the Fourth Circuit.

ORDER BELOW

The opinion of the panel decided December 15, 1987, is reported at Jeffers v. Leeke, 835 F.2d 522 (4th Cir. 1987), and found in the Appendix pp. A1 - A17. A timely petition for rehearing with suggestion for rehearing in banc was denied on January 20, 1988, is unreported and found at pages A18 - A19. The order of March 31, 1987, of the Honorable Clyde H. Hamilton, Jr., United States District Judge, is unreported and set forth at pages A20 - A69.

JURISDICTION

The petition for rehearing was denied on January 20, 1988. Petitioner asserts the jurisdiction of this Court is made pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution which states, in its pertinent part: "In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense."

RESPONDENTS' STATEMENT OF THE CASE

The United States Court of Appeals reversed the judgment of the United States District Court and remanded with directions to dismiss the petition for a writ of habeas corpus on the ground of ineffective assistance of counsel. This petition for certiorari follows.

The habeas Petitioner, Frank Durant Jeffers, was indicted at the

April, 1981 term of the Court of General Sessions for Lexington County for murder. He was represented at that time by H. Patterson McWhirter, Public Defender for Lexington County. After a trial by jury on October 30, 1981, he was found guilty of murder and sentenced by the Honorable George Bell Timmerman, Jr., to life imprisonment.

Thereafter, Petitioner filed a notice of intention to appeal and the appeal from his conviction and sentence was perfected by the Office of Appellate Defense. The South Carolina Supreme Court dismissed the appeal under Rule 23 of the Rules of Practice of that court. State v. Jeffers, Mem. Op. No.83-MO-111 (filed May 20, 1983). (A. p. 310).

Thereafter, by way of an Application for Post Conviction Relief dated August 4, 1983, Petitioner instituted collateral proceedings in the Lexington County Court of Common Pleas. In the Application, Petitioner alleged, inter alia, that his attorney did not object or move for a mistrial when reference was made during the trial to his post-arrest silence. After an evidentiary hearing was held on the allegations on July 25, 1984, the Honorable Larry R. Patterson, Presiding Judge, issued his order dated November 21, 1984, denying and dismissing the state Application for Post-Conviction Relief. (A. pp. 347-356).

Petitioner thereafter filed a Petition for Writ of Certiorari to

the South Carolina Supreme Court appealing the denial of post conviction relief. Petitioner raised the issues whether he received ineffective assistance of counsel when his attorney did not object to evidence that Petitioner had requested an attorney and exercised his right to remain silent and whether counsel's error in failing to object was harmless beyond a reasonable doubt. (A. pp. 357-372). After return was made by the state, (A. pp. 373-380), the South Carolina Supreme Court issued its order dated August 28, 1985, stating that "after careful consideration of this Petition, we are of the opinion it should be denied." (A. p. 381).

Thereafter, Petitioner filed his Petition for Writ of Habeas Corpus in the federal court. (A. pp. 382-387). The state moved for summary judgment. (A. pp. 388 - 400). The matter was referred to the federal magistrate who issued his report and recommendation to the District Court recommending that Respondent's Motion for Summary Judgment be granted. (A. pp. 401-411). The Magistrate found that "this Court is bound by the state court's finding of historical fact that trial counsel's failure to object to comments concerning the Petitioner's request for counsel was tactical decision." (A. p. 408). The Magistrate also found that Petitioner was not denied effective assistance of

counsel since, based on a review of all of the evidence, Petitioner did not prove that, but for counsel's alleged errors, the result of the proceeding would have been different under the prejudice prong of the test enunciated in Strickland v. Washington, 466 U.S. 668 (1984). (A. pp. 409-411).

The Petitioner made written objections to various factual findings of the report. (A. pp. 413-415).

On March 31, 1987, the Honorable Clyde H. Hamilton, United States District Judge, issued his order that the writ of habeas corpus be issued directing that the state discharge Petitioner within seventy-five days of the filing of this order unless the state decided

to retry the Petitioner within that period. (A. pp. 416-443). The District Court concluded that the Petitioner received ineffective assistance of counsel in the state criminal trial.

The Respondents appealed to the United States Court of Appeals for the Fourth Circuit. The Court reversed the lower court and concluded the Petitioner was not prejudiced by defense counsel's failure to object to comments on his postarrest silence and request for counsel where no special attention was directed to the comments and there was no reasonable probability that, absent the errors, the jury would have had a reasonable doubt respecting guilt. The Court also held that

although the prosecution improperly elicited and made comments on his postarrest silence to counter his claim of accident, the references were harmless beyond a reasonable doubt in view of extensive testimony that from the time of the shooting continuing through the trial the Petitioner consistently asserted the defense of accident and also in view of the quantum of other evidence indicative of his intent.

Statement of the Facts

On March 8, 1981, the Petitioner shot and killed his wife, Tammie Wells Jeffers. On October 30, 1981, Petitioner proceeded to be tried by a jury and was found guilty of murder and sentenced by the Honorable George

Bell Timmerman, Jr., to life imprisonment. At trial, Petitioner admitted shooting his wife with his shotgun but argued that the shooting was an accident. Petitioner testified that, on the day of the incident, he, his wife and infant daughter visited various relatives and friends. Petitioner also admitted that he smoked some marijuana and drank some alcoholic beverages. Following their visits, Petitioner and his family returned home. At that time, they were living in the home of the deceased's father and mother. Petitioner went into his bedroom to listen to music. Over a period of time, Petitioner raised the volume of his stereo and his father-in-law told Petitioner's wife, the

deceased, to cut the stereo down. Petitioner further testified that he went to his closet and took out a single-shot shotgun. He stated that he loaded the shotgun with a shell and placed the gun on the bed. Petitioner further testified that his wife soon thereafter entered the room, holding their baby, at which time the Petitioner picked up the gun and cocked it. Petitioner stated that his wife asked him what he was going to do with the gun and Petitioner replied he wanted his father-in-law to come into the room and try to tear his stereo up as he had threatened to do. He testified that he wanted to scare his father-in-law. Petitioner further stated that he made a sudden movement trying to

unbreech the shotgun at which time his wife screamed, "no, Frankie, no, don't." He stated then that the gun slipped out of his hands, fell on the bed, went off and struck his wife. Petitioner then ran out of the house but after a few minutes, tried to return. At that time, his father-in-law would not let him back inside and Petitioner pulled a knife on him and attempted to hit him with a coke bottle. The victim was taken to the hospital where she died shortly thereafter. (See A. pp. 164-176).

The critical issue in this case concerns whether trial counsel rendered ineffective assistance of counsel under Strickland, supra, by failing to object to or make

motions to strike testimony or move for a mistrial on three occasions when reference was made to Petitioner's silence or request for counsel after he had been read his rights under Miranda v. Arizona, 384 U.S. 436 (1966). The first occasion involved the Solicitor's direct examination of the investigating officer, Detective Dalton White. The testimony was as follows:

> Q: Did you have occasion to see him after he got back to the jail?
>
> A: Yes, sir. It's normal procedure after a person has been booked in, if it's a case I've been assigned to, I get the person and bring 'em back down to my office and talk to 'em. I talked to him; I advised him of his rights; and he refused to talk to me and requested an attorney be present.
>
> Q: Did you interrogate him any further?

> A: No, sir. I turned him back to the jail sergeant.

(A. pp. 70-71). On cross - examination of Detective White, the following exchange took place between trial counsel and the witness:

> Q: Did you ask him where he was going when he was wandering four blocks away?
>
> A: When I talked to Frankie he indicated that he wanted an attorney.
>
> Q: That was after a while, but at first when you talked to him, he was just upset.
>
> A: Yes, sir.

(A. p. 88). Finally, during a portion of the Solicitor's argument to the jury, the Solicitor stated:

> Then they took him back to the Sheriff's Department, booked 'im and when they tried to talk to'im, what did Frank say? I want a lawyer. This is a man who was so distraught

> over his wife, who was incoherent with grief, out of his mind with misery, and he wants a lawyer right away. Was he so out of his mind that he doesn't know to ask for an attorney. He knows he's in trouble. Big trouble. He's sharp enough to ask for an attorney.

(A. p. 228). After hearing the testimony of the state's witnesses and the witnesses for the defense, as well as the closing arguments of counsel and the trial judge's instructions, the jury returned a verdict of guilty and Petitioner was sentenced to life imprisonment.

ARGUMENT

I.

> The "clearly erroneous" standard of Rule 52(a) is inapplicable to the mixed question of law and fact of ineffective assistance of counsel.

The Petitioner contends that the Court of Appeals had no

authority under Rule 52(a) of Federal Rules of Civil Procedure to reverse a conclusion of the District Court of prejudice unless it determined the finding was "clearly erroneous." The Court below did not state whether it was applying the "clearly erroneous" standard to the conclusion of the Court. Assuming arguendo that it did, Rule 52 has no applicability to a mixed question of law and fact.

Whether the representation a criminal defendant received at trial was "constitutionally inadequate" is a mixed question of law and fact. Strickland v. Washington, 466 U.S. 668 (1984). In Strickland, the Court stated:

> Although state court findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement of § 2254(d), and although district court findings are subject to the clearly erroneous standard of Federal Rule of Civil Procedure 52(a), both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.

466 U.S. at 698. Respondents submit that the "clearly erroneous" standard applies to the "basic, primary, or historical facts: facts in the sense of a recital of external events and the credibility of their narrators ...." Townsend v. Sain, 372 U.S. 293, 309 n. 6 (1963). Respondents further submit that the standard does not apply to the legal effect to be accorded the district court's findings of basic, historical fact, where the court of

appeals is free to substitute its own judgment for that of the district court.

In Strickland, this Court clearly stated both the performance and prejudice components of the ineffectiveness that were mixed questions of law and fact rather than historical facts. In his Petition, the Petitioner maintains that "prejudice" is a finding of fact. His position is clearly wrong and not in accord with the Strickland decision upon which he relies. The appellate court has the authority to determine under its own judgment whether the conduct determined by the historical facts constitutes ineffective assistance of counsel. See Wiley v. Wainwright, 793 F.2d 1190 (11th Cir. 1986).

In summary, this Court's precedent makes clear that whether a defendant has enjoyed effective assistance of counsel is a mixed question of law and fact. While subsidiary findings of basic, historical fact that a district court made after it conducted an evidentiary hearing are subject to review under the clearly erroneous standard of Rule 52(a), the district court's ultimate conclusions as to whether he enjoyed the effective assistance of counsel is not subject to review under that standard, and the court of appeals must make an independent evaluation based upon those historical findings in determining whether counsel's representation satisfied the qualitative,

normative standards dictated by the Sixth Amendment. Accord Government of Virgin Islands v. Zepp, 748 F.2d 125, 134 (3rd Cir. 1984); Washington v. Watkins, 655 F.2d 1346, 1354 (5th Cir. 1981); Wiley v. Wainwright, supra. The Court of Appeals complied with this Court's precedent and the petition for certiorari is without merit.

II.

The Court of Appeals properly concluded that the Petitioner was not prejudiced by defense counsel's failure to object to comments of his postarrest silence and request for counsel.

The Court of Appeals determined that there was no reasonable probability that, absent the failure to object, the jury would have had a reasonable

probability respecting guilt. Respondents submit that the Court properly applied this Court's precedent and that certiorari should be denied.

In its opinion, the Fourth Circuit did not address whether the performance was deficient because it concluded that the Petitioner had not established prejudice. To establish prejudice, a defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. Considering the

totality of the evidence, the Court found that there was no a reasonable probability that, absent the errors, the factfinder would have a reasonable doubt respecting guilt. Id. at 695.

Here, the Court found that no special attention was directed at the two comments on postarrest silence. Further, the comment on recross-examination of the investigating officer was clarified by testimony that the Petitioner only requested counsel "after awhile, but at first when [the officer] talked to him, he was just upset." (A. p. 88). During the argument, the prosecutor argued that his silence and request for counsel were inconsistent with his assertion of being distraught and

incoherent with grief. The Court found, however, that any negative impact from these comments was diminished by the extensive evidence that from the moment the shooting occurred, the Petitioner did appear to be upset and was persistent in his claim that the shooting was an accident. He made numerous statements to law enforcement and others immediately after the shooting that were wholly consistent with his trial testimony.

Here, the comments as to postarrest silence could not have planted in the mind of the jury that the defendant had something to hide or that his defense of accident which was proffered was recent fabrication. These were the

concerns of Doyle v. Ohio, 426 U.S. 610, 616-617 (1976). The impact of the comments here was harmless beyond a reasonable doubt in view of the entire record that included his consistent and continuous assertions of an accident defense. The Court of Appeals decision properly applied the precedent of this Court and certiorari is not warranted.

CONCLUSION

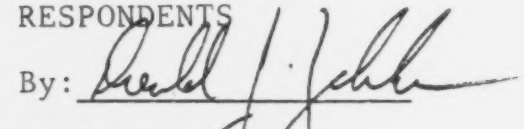
For all the foregoing reasons, we submit that certiorari must be denied.

Respectfully submitted,

T. TRAVIS MEDLOCK
Attorney General

DONALD J. ZELENKA
Chief Deputy Attorney
General

ATTORNEYS FOR
RESPONDENTS

By: 

April 21, 1988
Columbia, South Carolina

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AFFIDAVIT OF FILING

PERSONALLY appeared before me, Donald J. Zelenka, who being duly sworn, deposes and says that he is a member of the Bar of this Court and that on this date he filed the original and forty copies of Brief in Opposition to Petition for Writ of Certiorari in the above captioned case by depositing same in the U. S. Mail, first-class postage prepaid, and properly addressed to the Clerk of this Court.

This 21st day of April, 1988.

Donald J. Zelenka

SWORN to before me this
21st day of April, 1988.

(LS)
Notary Public for South Carolina
My Commission Expires: 4-21-99.

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AFFIDAVIT OF SERVICE

PERSONALLY appeared before me, Donald J. Zelenka, who being duly sworn, deposes and says that he served the foregoing Brief in Opposition to Petition for Writ of Certiorari on the Petitioner by depositing three copies of the same in the United States Mail, first class postage prepaid, and addressed to James B. Richardson, Jr., Richardson and Smith, 1338 Main Street, Suite 808, Columbia, South Carolina 29201. He further

certifies that all parties required to be served have been served.

This 21st day of April, 1988.

Donald J. Zelenka

SWORN to before me this
21st day of April, 1988.

Frances R. Cowan (LS)
Notary Public for South Carolina
My Commission Expires: 4-14-97.